

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re AMERICAN REALTY CAPITAL	:	Civil Action No. 1:15-mc-00040-AKH
PROPERTIES, INC. LITIGATION	:	
	:	<u>CLASS ACTION</u>
	:	
This Document Relates To:	:	
	:	
ALL ACTIONS.	:	
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MEMORANDUM OF LAW IN SUPPORT OF CLASS PLAINTIFFS’ MOTION TO
PRECLUDE EXPERT WITNESS WALTER N. TOROUS

I. INTRODUCTION

This Court has found, and Class “Plaintiffs’ expert Steven Feinstein (“Feinstein”) has opined, that the American Realty Capital Properties, Inc. (“ARCP”) securities and notes (collectively, the “ARCP Securities”) at issue here traded in an efficient market throughout the Class Period (February 28, 2013 through October 29, 2014). Defendants have offered the opinion of Walter N. Torous (“Torous”) in purported rebuttal of Feinstein’s opinion regarding market efficiency, but they are really trying to use Torous to rebut the universally recognized sufficiency of the seven indirect *Cammer/Krogman* factors: “We conclude that direct evidence of price impact under *Cammer* is not always necessary to establish market efficiency and invoke the Basic presumption” *Waggoner v. Barclays PLC*, 875 F.3d 79, 96-97 (2d Cir. 2017), *cert. denied*, __ U.S. __, 138 S. Ct. 1702 (2018). Torous seeks to dispute decades of caselaw, including this Court’s reasonable reliance on *all* of the *Cammer/Krogman* factors.

Torous does not dispute that all seven of these factors were satisfied throughout the Class Period. Nor does he assert that any of these securities and notes traded in an inefficient market at any point of the Class Period. Rather, contends that the seven indirect *Cammer/Krogman* factors are per se insufficient to establish market efficiency: “‘The indirect Cammer and Krogman factors are not sufficient to establish market efficiency.’ That’s my opinion.” Declaration of Jason A. Forge in Support of Class Plaintiffs’ Motions to Exclude Experts (“Forge Decl.”), Ex. 7 at 112:20-25, filed concurrently herewith. In fact, Torous opines that at least six of the seven indirect *Cammer/Krogman* factors, have “no bearing whatsoever on whether, in fact, a company’s securities are trading in an efficient market.” *See, e.g., id.* at 114:8-16.

Torous’s condemnation of, and disregard for, the seven indirect *Cammer/Krogman* factors flatly contradicts binding Second Circuit precedent. As such he should be excluded from trial.

II. FACTS

After the Court held a hearing on class certification, the Court issued a written order that expressly relied on all eight *Cammer*¹/*Krogman*² factors, including the seven indirect factors. ECF No. 505 at 1-2.

Torous disagrees with that reliance, and throughout his deposition, he made clear his complete disregard for the seven indirect *Cammer/Krogman* factors:

[I]s it your testimony that the existence of multiple analysts covering one security versus no analysts covering another security does not in any way, shape or form make it more likely that the first security is trading in an efficient market?

[Objection]

THE WITNESS: Yes.

Forge Decl., Ex. 7 at 104:18-25.

Is it your testimony that the third *Cammer* factor, the one concerning market-makers and other evidence of arbitragers, has no bearing whatsoever on whether, in fact, a company's securities are trading in an efficient market?

[Objection]

THE WITNESS: That's correct.

Id. at 114:21-115:2.

Is it your testimony that the fourth *Cammer* factor, Form S-3 eligibility, has no bearing whatsoever on whether a company's security is trading in an efficient market?

[Objection]

THE WITNESS: I would agree with that statement.

Id. at 116:4-10.

¹ *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989).

² *Krogman v. Sterritt*, 202 F.R.D. 467, 477-78 (N.D. Tex. 2001).

Q. Is it your testimony that the first Krogman factor, market capitalization, has no bearing whatsoever on whether a company's security is trading in an efficient market?

A. Again, I'll answer it I would not consider that factor in assessing market efficiency, but with that as a proviso, my answer is yes.

Id. at 118:13-19.

Is it your testimony that the average bid/ask spread for a company's security has no bearing whatsoever on whether that company's security is trading in an efficient market?

[Objection]

THE WITNESS: And, again, I'd answer that question in the same way I did hopefully others, that I would not assess market efficiency based on that, so if pressed to answer that question in that context, the answer is yes.

Id. at 118:22-119:7.

Is it your testimony that a company's float or percentage of stock not held by insiders has no bearing whatsoever on whether that company's security is trading in an efficient market?

[Objection]

THE WITNESS: Again, I would not consider that factor, but to answer your question in that – with that as background, the answer is yes.

Id. at 119:12-20.

Torous emphasized that his outright disregard for the seven indirect *Cammer/Krogman* factors was “very clear”:

THE WITNESS: Again, my testimony – again, it's very clear – again, if we go to Section IV of my report, “The indirect *Cammer* and *Krogman* factors are not sufficient to establish market efficiency.”

That's my opinion.

Id. at 112:20-25.

Notwithstanding his intransigent dismissal of the indirect *Cammer/Krogman* factors, Torous was unable to identify a single instance in the past ten years where a security satisfied all seven of these facts, but traded in an inefficient market:

[C]an you identify for me a single instance where a security fulfilled the first four Cammer factors and the three Krogman factors, that is, the indirect tests, but still traded in an inefficient market?

[Objection]

THE WITNESS:· Not in the last ten years.

Id. at 131:1-8. Nevertheless, Torous also rejected the premise that a security traded on the NYSE or the NASDAQ is presumed to be efficient. *Id.* at 37:18-25.

III. ARGUMENT

It is well established that an expert witness may not “usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it.” *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); *see also Marx & Co., Inc. v. Diners’ Club Inc.*, 550 F.2d 505, 510 (2d Cir. 1977) (“As Professor Wigmore has observed, expert testimony on law is excluded because ‘the tribunal does not need the witness’ judgment. . . . (T)he judge (or the jury as instructed by the judge) can determine equally well. . . .’ The special legal knowledge of the judge makes the witness’ testimony superfluous.”) (citation omitted).

Torous is one of the 17 experts defendants have amassed to try to explain away a fraud so undeniable that: (1) a jury has already found ARCP’s Chief Financial Officer guilty of securities fraud and conspiring to commit securities fraud; (2) ARCP’s Chief Accounting Officer pled guilty to securities fraud; and (3) Judge Oetken found that ARCP was Brian Block’s co-conspirator. Under these circumstances, the Second Circuit’s warnings in *Marx* are particularly apt here, where Torous seeks to refute the courts’ universal embrace of the *Cammer/Krogman* factors:

- “With the growth of intricate securities litigation over the past forty years, we must be especially careful not to allow trials before juries to become battles of paid advocates posing as experts on the respective sides concerning matters of domestic law.” *Marx*, 550 F.2d at 511.
- “[E]xperience is hardly a qualification for construing a document for its legal effect when there is a knowledgeable gentleman in a robe whose exclusive province it is to instruct the jury on the law. The danger is that the jury may think that the ‘expert’ in the particular branch of the law knows more than the judge – surely an inadmissible inference in our system of law.” *Id.* at 512.

There is no question that this Court, and virtually every other, regards *all eight* of the *Cammer/Krogman* factors to be reliable indicators of market efficiency. *See, e.g.*, ECF No. 505 at 1-2; *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, 328 F.R.D. 86, 94 (S.D.N.Y. 2018) (“[T]he Second Circuit has nodded approvingly at the *Cammer* and *Krogman* factors, so named after the district court cases expounding them.”). There is simply no way to square that universal acceptance and Torous’s concession that all seven indirect *Cammer/Krogman* factors were satisfied throughout the Class Period with Torous’s opinion that “‘neither Dr. Feinstein, nor Dr. Nye provide reliable evidence that the ARCP securities traded in efficient markets at all times during the relevant periods.’” *Forge Decl.*, Ex. 7 at 60:5-9. This criticism is just a summary of Torous’s opinion that each of the seven indirect *Cammer/Krogman* factors has no bearing whatsoever on whether a security trades in an efficient market.

Torous’s exclusive reliance on *Cammer*’s fifth factor, and dogmatic refusal to acknowledge the relevance of the other seven *Cammer/Krogman* factors, directly contradicts the Second Circuit’s holding in *Waggoner* just last year: “We conclude that direct evidence of price impact under *Cammer* is not always necessary to establish market efficiency and invoke the *Basic* presumption, and that such evidence was not required in this case at the class certification stage.” 875 F.3d at 96-97. What factors are useful for determining whether a security traded in an efficient market does not depend on the stage of litigation. The Second Circuit has expressly held that the seven indirect

Cammer/Krogman factors **are** sufficient to support a market-efficiency determination, and this holding is entitled to the same level of deference whether at class certification or at trial. Likewise, there is no question that this Court expressly relied on these seven indirect factors, as well as the direct factor, when holding that plaintiffs were entitled to the *Basic* presumption of reliance.

Torous also demonstrated his disagreement with the courts by flatly rejecting the well-recognized view that a security traded on the NYSE or the NASDAQ is presumed to be efficient. *Cf. Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, No. 05 Civ. 1898 (SAS), 2006 WL 2161887, at *8 (S.D.N.Y. Aug. 1, 2006) (“If, for example, a security is listed on the NYSE, AMEX, NASDAQ, or a similar national market, the market for that security is presumed to be efficient.”) (collecting cases), *aff’d*, 546 F.3d 196 (2d Cir. 2008).

In addition to directly contradicting virtually all judicial opinions on market efficiency, Torous’s opinions are completely untethered from any actual facts or data because Torous conceded that he is unaware of a **single** instance over the past ten years when a security satisfied all seven indirect *Cammer/Krogman* factors, yet did **not** trade in an efficient market. This detachment from any facts or data is reason alone to exclude Torous. *See* Fed. R. Evid. 702(b) (mandating that an expert’s opinion be “based on sufficient facts or data”).

It is apparent that defendants seek to use Torous not just to rebut Feinstein, but to also rebut the Second Circuit, this Court, and virtually every other court to consider market efficiency issues for well over a decade. This is wholly improper. At best, it will confuse the jury. At worst, it will convince one or more jurors to ignore the Court’s market-efficiency instructions. Either way, this is the opposite of the permissible use of an expert. *See, e.g., Bilzerian*, 926 F.2d at 1294; *Marx*, 550 F.2d at 510-12.

IV. CONCLUSION

For all the foregoing reasons, Class Plaintiffs respectfully request that the Court exclude at trial the testimony of expert witness Walter N. Torous.

DATED: August 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on August 5, 2019, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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